IN THE SUPREME COURT OF MISSOURI

STATE EX REL. OSCAR LAZCANO AND WCP PATHOLOGY, INC.,	)	
RELATORS,	)	
	)	APPEAL NO.: SC85675
VS.	)	
HONORABLE MARK D. SEIGEL, CIRCUIT JUDGE, DIVISION 3, MISSOURI CIRCUIT COURT, TWENTY-FIRST JUDICIAL CIRCUIT, COUNTY OF ST. LOUIS COUNTY,	)	
RESPONDENT.	)	

ORIGINAL PROCEEDING IN PROHIBITION

ON PRELIMINARY RULE IN PROHIBITION FROM THE SUPREME COURT OF MISSOURI TO THE HONORABLE MARK D. SEIGEL, CIRCUIT JUDGE OF THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS

BRIEF OF RELATORS

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JURISDICTIONAL STATEMENT

Relators Oscar Lazcano, M.D., and WCP Pathology, Inc., brought this original proceeding in prohibition to obtain interlocutory review of an order entered by Respondent, the Honorable Mark D. Seigel, Presiding Judge of Division 3 of the Circuit Court of the County of St. Louis, on April 22, 2003, which denied Relators' motion to dismiss based on the expiration of the two-year statute of limitations, Section 516.105, R.S.Mo. 2000. (A11.) The underlying action, *Lonnie Davidson, et al. v. Oscar Lazcano, et al.*, No. 02CC-004179 (Mo. Cir. Ct., St. Louis Cty.), is a medical malpractice action arising out of Dr. Lazcano's analysis of a test sample from Mr. Davidson's lymph node on November 3, 1998, and the resulting diagnosis of malignant lymphoma. (A2.) Plaintiffs filed their action almost four years later on October 21, 2002. (A5.)

The Court has jurisdiction because it issued a Preliminary Writ of Prohibition on November 25, 2003. Under Article V, Section 4 of the Missouri Constitution, the Court has authority to determine and issue remedial writs.

STATEMENT OF FACTS

This original proceeding in prohibition arises from *Lonnie Davidson, et al. v. Oscar Lazcano, et al.*, No. 02CC-004179 (Mo. Cir. Ct., St. Louis Cty.), a medical malpractice action filed in the Circuit Court of St. Louis County. Plaintiffs Lonnie and Margaret Davidson allege Oscar Lazcano, M.D., and WCP Pathology, Inc., committed medical malpractice in their analysis of a biopsy of Mr. Davidson's lymph node, which resulted in a diagnosis of malignant lymphoma. Plaintiffs filed their action almost four years after the alleged negligence took place.

On October 21, 2002, Plaintiffs filed their petition against Dr. Lazcano and WCP Pathology. (A5.) They allege Dr. Lazcano analyzed a biopsy of Mr. Davidson's lymph node on November 3, 1998, and diagnosed him with a malignant lymphoma, mantle zone type. (A2, Petition, ¶ 7.) Plaintiffs plead Dr. Lazcano was negligent because:

> 8. Defendant Oscar Lazcano was negligent in the treatment he provided to Plaintiff in that he failed to exercise the degree of skill and learning ordinarily used by a physician in the same and similar circumstances because he failed to properly treat said conditions in the following respects:
>
> (a) he failed to properly *analyze* said lymph node, or
>
> (b) he properly analyzed said lymph note but failed to communicate the *proper* result to plaintiff's treating physicians. (Emphasis added.)

(A2, Petition, ¶ 8.)

Plaintiffs allege Mr. Davidson's treating physician relied on the biopsy results until October 23, 2000. (A2, Petition, ¶ 9.) They further allege that on October 30, 2000, Mr. Davidson received a letter from his treating physician informing him that the test results reported by Dr. Lazcano were incorrect, and that he did not have mantle cell lymphoma. (A2, Petition, ¶ 10.) Plaintiffs' alleged damages flow from the unnecessary radiation treatments performed on Mr. Davidson because of the incorrect diagnosis. (A3, Petition, ¶ 11.)

Dr. Lazcano and WCP Radiology moved for the dismissal of Plaintiffs' petition. (A9, Motion.) They argued Plaintiffs' action was barred by the statute of limitations, Section 516.105, R.S.Mo. 2000, because Plaintiffs' petition had been filed more than two years after the alleged negligence. (*Id*.)

Respondent denied their motion. (A11.) The Eastern District of the Missouri Court of Appeals later denied their Petition for Writ of Prohibition. (A12.) This original proceeding in prohibition followed.

POINT RELIED ON

I. Relators are entitled to an order prohibiting Respondent from taking any action other than dismissing Plaintiffs' medical malpractice action, because the two-year statute of limitations for actions against health care providers, Section 516.105, R.S.Mo. 2000, bars Plaintiffs' action as a matter of law, in that:

A. Section 516.105 begins to run on the date of the alleged act of neglect rather than the discovery of the alleged harm;

B. The negligence pleaded by Plaintiffs, namely, Relators' alleged failure to properly analyze Plaintiff Lonnie Davidson's biopsy or their failure to communicate the proper results, occurred on November 3, 1998, almost four years before Plaintiffs filed their action on October 21, 2002;

C. The "failure to inform" exception under Section 516.105 is inapplicable because Relators did inform Mr. Davidson's treating physician of the test results, and the exception, by its plain language, does not create a further exception to the statute of limitations where test results are, in fact, communicated, but the results may be erroneous; and

D. The "continuing care" exception does not toll the application of Section 516.105 because Plaintiffs allege no involvement by Relators in Mr. Davidson's care after November 3, 1998.

Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. banc 1995)

Green v. Washington Univ. Med. Ctr., 761 S.W.2d 688 (Mo. App. E.D. 1988)

Hammond v. Municipal Correction Institute, 117 S.W.3d 130 (Mo. App. W.D. 2003)

State ex rel. Police Retirement System of St. Louis v. Mummert, 875 S.W.2d 553 (Mo. banc 1994)

Section 516.105, R.S.Mo. 2000

ARGUMENT

I. Relators are entitled to an order prohibiting Respondent from taking any action other than dismissing Plaintiffs' medical malpractice action, because the two-year statute of limitations for actions against health care providers, Section 516.105, R.S.Mo. 2000, bars Plaintiffs' action as a matter of law, in that:

A. Section 516.105 begins to run on the date of the alleged act of neglect rather than the discovery of the alleged harm;

B. The negligence pleaded by Plaintiffs, namely, Relators' alleged failure to properly analyze Plaintiff Lonnie Davidson's biopsy or their failure to communicate the proper results, occurred on November 3, 1998, almost four years before Plaintiffs filed their action on October 21, 2002;

C. The "failure to inform" exception under Section 516.105 is inapplicable because Relators did inform Mr. Davidson's treating physician of the test results, and the exception, by its plain language, does not create a further exception to the statute of limitations where test results are, in fact, communicated, but the results may be erroneous; and

D. The "continuing care" exception does not toll the application of Section 516.105 because Plaintiffs allege no involvement by Relators in Mr. Davidson's care after November 3, 1998.

1. Introduction and Standard of Review

The question presented by this original proceeding in prohibition is whether Section 516.105, R.S.Mo. 2000, the two-year statute of limitations for medical

malpractice actions, bars Plaintiffs' action. Relators Oscar Lazcano, M.D., and WCP Pathology, Inc., request the Court to make permanent its preliminary writ of prohibition because Plaintiffs filed their action almost four years after the alleged act of neglect complained of in their petition.

Prohibition is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001). Prohibition is a discretionary writ. The writ will issue "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Id.*

The writ is available to avoid useless lawsuits and to afford relief at the earliest possible moment in the litigation. *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 296 (Mo. App. E.D. 1980). Prohibition "may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." *State ex rel. Lithicum*, 57 S.W.3d at 857. The writ should issue where the trial court wrongly decides a matter of law where the facts are uncontested, and thus deprives a party of an absolute defense. *State ex rel. Police Retirement System of St. Louis v. Mummert*, 875 S.W.2d 553, 555-56 (Mo. banc 1994); *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 500 (Mo. App. E.D. 1985).

The writ is the proper remedy to prevent a lower court from proceeding with an action barred by the statute of limitations. *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624, 626-28 (Mo. banc 1994); *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 95-96 (Mo. App. S.D. 2001). Where the pleadings demonstrate the plaintiffs' action is time barred,

prohibition should issue. *State ex rel. Hamilton v. Dalton*, 652 S.W.2d 237, 239 (Mo. App. E.D. 1983).

Plaintiffs have brought a medical malpractice action for an alleged act of neglect that took place on November 3, 1998. (A2.) As Section 516.105 begins to run at the time of the negligent act, rather than the date of discovery of the harm, Plaintiffs' action is time-barred because Plaintiffs filed their action on October 21, 2002, almost four years after the alleged malpractice. (A5.) Therefore, prohibition is warranted to terminate this litigation that is barred by the statute of limitations as a matter of law.

2. Section 516.105 bars Plaintiffs' action as a matter of law.

Actions against health care providers are governed by Section 516.105. *Brickey v. Concerned Care of the Midwest, Inc.*, 988 S.W.2d 592, 597 (Mo. App. E.D. 1999). Section 516.105 states in part:

> All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to healthcare shall be brought within two years from the date of occurrence of the act of neglect complained of . . . .

Plaintiffs' petition purports to state a medical malpractice action against Dr. Lazcano and WCP Pathology. (A1-4.) Plaintiffs allege Dr. Lazcano improperly

analyzed a biopsy of Plaintiff Lonnie Davidson's lymph node. (A2, Petition, ¶ 8(a).) Alternatively, they allege Dr. Lazcano informed Mr. Davidson's treating physician of test results that were incorrect. (A2, Petition, ¶ 8(b).)

WCP Pathology's alleged liability is derivative. Plaintiffs allege Dr. Lazcano was acting within the scope and course of his employment as an agent, servant, and employee of WCP Pathology at the times mentioned in their petition. (A2, Petition, ¶ 5.) Aside from Dr. Lazcano's conduct, Plaintiffs plead no other basis for stating a claim against WCP Pathology.

Plaintiffs plead Dr. Lazcano's alleged acts of neglect as follows:

> 8. Defendant Oscar Lazcano was negligent in the treatment he provided to Plaintiff in that he failed to exercise the degree of skill and learning ordinarily used by a physician in the same and similar circumstances because he failed to properly treat said conditions in the following respects:
>
> (a) he failed to properly *analyze* said lymph node, or
>
> (b) he properly analyzed said lymph note but failed to communicate the *proper* result to plaintiff's treating physicians. (Emphasis added.)

(A2, Petition, ¶ 8.)

According to Plaintiffs' petition, Dr. Lazcano analyzed Mr. Davidson's lymph node specimen on November 3, 1998, and diagnosed his condition as malignant lymphoma, mantle zone type. (A2, Petition, ¶ 7.) Plaintiffs' action is based on Dr.

Lazcano's alleged failure to properly diagnose Mr. Davidson's lymph node specimen. To come within the statute of limitations, Plaintiffs would have had to file their petition within two years of Dr. Lazcano's alleged negligence on November 3, 1998. *Swallows v. Weathers*, 915 S.W.2d 763, 764 (Mo. banc 1996); *Green v. Washington Univ. Med. Ctr.*, 761 S.W.2d 688, 689-90 (Mo. App. E.D. 1988). This Plaintiffs failed to do.

Consider the holding in *Green*, a factually similar case. In *Green*, the plaintiff was examined on June 29, 1984. 761 S.W.2d at 689. On that date, the plaintiff was x-rayed and received an electrocardiogram. *Id.* On August 12, 1987, over three years later, the plaintiff sued the examining doctors and claimed the doctors, in performing the medical tests, failed to diagnose calcified kidney stones. *Id.* On appeal, the Missouri Court of Appeals held the plaintiff's action was barred by the two-year statute of limitations, explaining:

> Plaintiff's claims against defendants were based upon defendants' failure to diagnose a condition which existed at the time of the physical exam. The negligent act complained of therefore occurred on June 29, 1984. Plaintiff's limitation period commenced to run on June 29, 1984 . . . .

Id. at 690.

Here, Plaintiffs allege Dr. Lazcano analyzed a biopsy taken from Mr. Davidson's lymph node on November 3, 1998. (A2, Petition, ¶ 7.) Dr. Lazcano then communicated the results of his analysis to Mr. Davidson's treating physician. (A2, Petition, ¶¶ 8-9.) As demonstrated by their petition, Plaintiffs allege Dr. Lazcano's act of neglect occurred on November 3, 1998, almost four years before Plaintiffs filed their action on October 21,

2002. Therefore, under Section 516.105, Plaintiffs' claim is barred by the two-year statute of limitations as a matter of law.

3. The "failure to inform" exception, which must be strictly construed, is inapplicable because Plaintiffs' action is based on an alleged misdiagnosis, and not on a failure to inform of test results.

In his Answer, Respondent argues Plaintiffs' action is saved by the "failure to inform" exception under Section 516.105(2). (Answer, ¶¶ 12-15.) Respondent maintains Dr. Lazcano's alleged failure to properly analyze and report the test results to Mr. Davidson's treating physician is tantamount to a failure to inform. Respondent's argument should be denied. Plaintiffs' claim does not fall under Section 516.105(2).

Statutes of limitation are favorites of the law. *Butler v. Mitchell-Hugeback, Inc*., 895 S.W.2d 15, 19 (Mo. banc 1995). They cannot be avoided unless the party seeking to do so falls strictly within a claimed exception. *Id*. Statutory exceptions are strictly construed and may not be enlarged by the courts upon consideration of apparent hardship. *Id*. at 20.

Statutes of limitations may be suspended or tolled only by the specific disabilities or exceptions enacted by the legislature. *Hammond v. Municipal Correction Institute*, 117 S.W.3d 130, 138 (Mo. App. W.D. 2003). Courts cannot extend those exceptions. *Id*.

Respondent's argument ignores these principles. Section 516.105(2) creates a limited exception to the two-year statute of limitations. Subsection 2 modifies the statute of limitations in cases where the act of neglect is the physician's negligent failure to

inform the patient of medical test results. The exception provides "[i]n cases in which the act of negligence complained of is the negligent *failure to inform* the patient of the results of medical tests, the action for failure to inform shall be brought within two years of the date of the discovery of such alleged negligent *failure to inform.*" (Emphasis added.)

The exception is limited, by its terms, to cases where the health care provider allegedly fails to inform the patient of test results. The exception, however, does not embrace Plaintiffs' claim against Dr. Lazcano. Plaintiffs' claim does not strictly fall within the exception. The exception does not suspend the limitations period in cases where the health care provider failed to properly perform a medical test. Nor does the exception apply where the health care provider informs a patient of test results, but may have failed to communicate the proper result.

The rules of construction belie Respondent's argument. The primary rule of construction is to ascertain the legislature's intent from the language used and then to give the intent effect. *Riverside-Quindaro Bend Levee Dist. v. Intercontinental Engineering Mfg. Corp.*, 121 S.W.3d 531, 533 (Mo. banc 2003). The statute's words must be given their plain and ordinary meaning. *Id.* Where the statute's language is unambiguous, a court must give effect to the legislature's chosen language. *Kerperien v. Lumberman's Mut. Cas. Co.*, 100 S.W.3d 778, 781 (Mo. banc 2003). A court, in construing a statute, may not supply, insert, or read words into a statute unless there is an omission plainly indicated and the statute as written is unintelligible. *State ex rel. May Dept. Stores Co. v. Weinstein*, 395 S.W.2d 525, 527 (Mo. App. E.D. 1965).

Section 516.105(2) creates a limited exception only where health care providers fail to inform patients of test results. That is not this case. Plaintiffs allege Dr. Lazcano failed to properly analyze and report the test results performed on Mr. Davidson's biopsy. Plaintiffs' claim is a failure to diagnose case. It is not a failure to report case. As alleged by Plaintiffs, Dr. Lazcano did, in fact, report the test results to Mr. Davidson's treating physician, although Plaintiffs allege he failed to properly perform his analysis, or alternatively, failed to report the proper result. (A2, Petition, ¶ 8.) In either case, a misdiagnosis allegedly resulted. Therefore, Plaintiffs' claim falls outside the exception's bounds.

The exception's antecedents confirm its limited scope. Statutes may be considered with reference to their historical background. *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 570 (Mo. App. E.D. 2002). The legislature amended Section 516.105 in response to the Court's decision in *Weiss v. Rojanasathit*, 975 S.W.2d 113 (Mo. banc 1998). In *Weiss*, consistent with the rules governing the construction of statutes of limitation and their exceptions, the Court strictly enforced the two-year statute of limitations to bar a malpractice claim brought by a patient who alleged her physician had failed to inform her that her test results were abnormal. Following *Weiss*, the legislature amended Section 516.l05 to modify the limitations period in cases where physicians fail to inform patients of their results. The amendment, by its plain and unambiguous language, does not address any other context. It does not create a "negligent test results" exception.

In the end, Respondent's argument is an impermissible attempt to engraft a "discovery" rule to the statute of limitations in failure to diagnose cases. Under Respondent's argument, the discovery rule would be applied in failure to diagnose cases and the statute of limitation would not accrue until the fact of damage was discovered. This argument runs afoul of the plain language Section 516.105(2). It is also contrary to the legislature's enactment of Section 516.105, the statute's limited exceptions, and the precedent addressing the statute, which recognize the legislature's refusal to apply a discovery rule to medical malpractice actions, except in cases involving foreign objects, and the recently enacted exception where a physician fails to inform a patient of test results. *See Laughlin v. Forgrave*, 432 S.W.2d 308, 313-14 (Mo. banc 1968); *Kamerick v. Dorman*, 907 S.W.2d 264, 266 (Mo. App. W.D. 1995); *Green v. Washington Univ. Med. Ctr.*, 761 S.W.2d 688, 690 (Mo. App. E.D. 1988); and *Young v. Medrano*, 713 S.W.2d 553, 554 (Mo. App. E.D. 1986).

The "discovery" rule is limited exclusively to the two situations specified in subsections 1 and 2 of Section 516.105. It is available in no other form of medical malpractice action. The rule does not apply in cases, such as this one, which involve a physician's failure to properly diagnose the patient's condition. *Green*, 761 S.W.2d at 690.

Respondent's argument is nothing more than an invitation to rewrite Section 516.105 to include an "erroneous test results" exception. However, the rules governing statutes of limitation foreclose Respondent's request. Statutes of limitation are the exclusive province of the legislature. The legislature has the inherent power to fix the

date on which the statute begins to run. *Magee v. Blue Ridge Professional Bldg. Co., Inc.*, 821 S.W.2d 839, 845 (Mo. banc 1991); *Laughlin*, 432 S.W.2d at 314. The legislature also has the sole power to create exceptions, which must be strictly construed, and not enlarged, by the courts. *Butler*, 895 S.W.2d at 20; *Hammond*, 117 S.W.3d at 138.

As the Court explained in *Weiss*, it is the legislature's function and not the judiciary's role to diminish any distasteful application of a statute of limitations. *Weiss*, 975 S.W.2d at 121. Restated, "[the Court's] function is to interpret the law; it is not to disregard the law as written by the General Assembly." *Id*. (quoting *Laughlin*, 432 S.W.2d at 314).

The Court's preliminary writ in prohibition should be made permanent. Plaintiffs' action is barred by the statute of limitations as a matter of law.

4. The "continuing care" exception is inapplicable because Dr. Lazcano had no involvement in Mr. Davidson's care after November 3, 1998.

Respondent, in his Answer, argues the "continuing care" exception also tolled Section 516.105 until October 23, 2000. (Answer, ¶¶ 16-20.) Respondent notes Plaintiffs pleaded that Mr. Davidson's treating physician relied on Dr. Lazcano's incorrect results until that time. (Answer, ¶ 17.) The "continuing care" exception does save Plaintiffs' action. Plaintiffs' allegations again belie Respondent's claim.

As alleged by Plaintiffs in their petition, Dr. Lazcano had no involvement in Mr. Davidson's care after November 3, 1998. (A2, Petition, ¶ 7.) The sole act of neglect occurred on November 3, 1998, when Dr. Lazcano allegedly analyzed Mr. Davidson's

lymph node and diagnosed his condition as malignant lymphoma. (*Id*.) No other act of neglect is pleaded.

Under the "continuing care" exception, Section 516.105 does not begin to run against the patient until treatment by the defendant physician ceases. *Green v. Washington Univ. Med. Ctr*., 761 S.W.2d 688, 689 (Mo. App. E.D. 1988). However, the exception only applies where the treatment is "continuing and of such nature as to charge the medical [provider] with the duty of continuing care and treatment which is essential to recovery." *Id.* (citing *Thatcher v. De Tar*, 173 S.W.2d 760, 762 (Mo. 1943)).

A patient under the defendant physician's continuing care is a prerequisite for the exception's application. *Montgomery v. South County Radiologists, Inc.*, 49 S.W.3d 191, 194 (Mo. banc 2001). Where a physician commits an act of neglect on one specific date, and has no other contract with the patient, Section 516.105 begins to run on that date. *Id.* Restated, a court will look to the last date medical services were rendered to determine when the statute begins to run. *Kamerick v. Dorman*, 907 S.W.2d 264, 266 (Mo. App. W.D. 1995). Thus, the "continuing care" exception does not apply when the plaintiff's petition is filed over two years after the last date of treatment, and the plaintiff alleges no facts indicating continuing treatment. *Green v. Washington Univ. Med. Ctr*., 761 S.W.2d 688, 689-90 (Mo. App. E.D. 1988).

The prerequisite for application of the "continuing care" exception to Plaintiffs' action is missing, namely, continued care. There is no allegation Dr. Lazcano rendered any medical services after November 3, 1998. There is no allegation he ordered more tests or follow-up treatment, or that he had authority to do so. Instead, Plaintiffs allege

Dr. Lazcano improperly analyzed Mr. Davidson's biopsy or failed to communicate the proper test results to his treating physician on November 3, 1998. Simply put, Plaintiffs allege no involvement by Dr. Lazcano in Mr. Davidson's care after that date.

Respondent's argument that Mr. Davidson's treating physician continued to rely on the test results and, therefore, Dr. Lazcano's involvement in his care continued until October 23, 2000, stretches the exception beyond its logical and proper application. The alleged reliance of Mr. Davidson's treating physician on Dr. Lazcano's test results and Mr. Davidson's subsequent course of treatment with his treating physician are irrelevant as factors to toll the statute. There are no allegations that Dr. Lazcano took any affirmative steps to induce Plaintiffs to delay in filing their lawsuit. *Cf. Weiss v. Rojanasathit*, 975 S.W.2d 113, 120-21 (Mo. banc 1998) (equitable estoppel unavailable to toll the statute of limitations absent affirmative acts taken by the defendant physician to mislead the plaintiff and, thus, avoid the statute of limitations). Although Plaintiffs allege Dr. Lazcano negligently analyzed Mr. Davidson's biopsy or negligently failed to communicate the correct results to his treating physician, these acts of neglect cannot be transformed into affirmative conduct designed to avoid the statute of limitations. *Id*. at 121.

This case is no different from one in which a physician misdiagnoses the patient's condition and informs the patient of the misdiagnosis. Absent the filing of a malpractice action within two years of the alleged mistake, the patient's claim is barred by Section 516.105 as a matter of law. The fact the patient discovered the misdiagnosis more than two years after the physician communicated the misdiagnosis is of no import. *Green v.*

Washington Univ. Med. Ctr., 761 S.W.2d 688, 690 (Mo. App. E.D. 1988). There is no "discovery" rule for claims against health care providers based on a misdiagnosis. *Id*.

The fact the alleged misdiagnosis in this case was communicated to a third party, another physician, does not support a different conclusion. In either case, Section 516.105 is not tolled until the patient discovers the defendant physician's alleged act of neglect. In either case, the patient's action is barred by the statute of limitations unless the action is brought within two years of the alleged malpractice. The law admits no other conclusion.

Unless and until the legislature engrafts a discovery rule to the statute of limitations for actions against health care providers, a medical malpractice action must be brought within two years of act of neglect complained of. Here, Plaintiffs failed to do so. As they waited almost four years after Dr. Lazcano's alleged malpractice before filing their action, Section 516.105 bars their claim as a matter of law.

5. Conclusion

When Plaintiffs' allegations are examined, their action can be construed only one way. They have brought a failure to diagnose claim against Dr. Lazcano and WCP Pathology, a claim falling under Section 516.105, the two-year statute of limitations for medical malpractice actions. As Plaintiffs filed their action almost four years after the act of neglect complained of, Section 516.105 bars their claim as a matter of law.

The "failure to inform" exception to Section 516.105 does not apply. No failure to inform Plaintiffs of test results is alleged. Instead, Plaintiffs allege the test was

improperly performed or that the proper results were incorrectly reported. Plaintiffs' claim falls outside the exception's bounds.

The "continuing care" exception also has no application. No continuing care is alleged on Dr. Lazcano's part. Absent in Plaintiffs' petition are any allegations that Dr. Lazcano had any involvement in Mr. Davidson's care after November 3, 1998. Therefore, Section 516.105 bars Plaintiffs' claim as a matter of law and warrants the Court's exercise of its original jurisdiction to make permanent its preliminary writ of prohibition.

Unless the writ is made absolute, Dr. Lazcano and WCP Pathology will be required to engage in unnecessary, inconvenient, and expensive litigation. *State ex rel. Police Retirement System of St. Louis v. Mummert*, 875 S.W.2d 553, 555 (Mo. banc 1994). As the statute of limitations has expired, they have a vested right to be free from suit. *State ex rel. Brandon*, 46 S.W.3d at 99. Without prohibition, they will not only be irreparably harmed in having to defend against a suit that is time barred, but they will be deprived of their right to be free from suit after the limitations period has expired. *Id*.

CONCLUSION

Relators Oscar Lazcano, M.D., and WCP Pathology, Inc., respectfully request the Court to make permanent the preliminary writ of prohibition and to direct Respondent to dismiss Plaintiffs' petition, with prejudice, in *Lonnie Davidson, et al. v. Oscar Lazcano, et al.*, No. 02CC-004179 (Mo. Cir. Ct., St. Louis Cty.).

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of Relators' Brief and a disk containing same were deposited on this 1st day of March, 2004, in the United States Mail, postage prepaid, addressed to: Mr. William M. Wunderlich, Attorney for Respondent and Plaintiffs, 1504 Gravois, High Ridge, Missouri 63049; and Mr. Daniel L. Mohs, Co-Counsel for Respondent and Plaintiffs, 4387 Laclede Avenue, St. Louis, Missouri 63108.

T. Michael Ward #32816

Subscribed and sworn to before me this 1st day of March, 2004.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Relators' Brief contains 5,060 words, and that the computer disk filed with Relators' Brief under Rule 84.06 has been scanned for viruses and is virus-free.

T. Michael Ward #32816

APPENDIX

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